IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No. 140 of 2001

For Approval and Signature:

Hon'ble MISS JUSTICE R.M. DOSHIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

KIRITBHAI D SHAH

Versus

STATE OF GUJARAT

Appearance:

MR YATIN SONI for Petitioners No. 1-2

MR HL JANI APP for Respondent No. 1

Opponent No. 2 - In person

CORAM : MISS JUSTICE R.M.DOSHIT

Date of decision: 04/12/2001

ORAL JUDGEMENT

Heard the learned advocates and the Opponent no.

2-Shri Harish Ambalal Kapasi.

The applicants before this Court are the accused nos. 6 & 7 in Criminal Case No. 2703 of 1994 pending before the learned Metropolitan Magistrate, Ahmedabad, Court No. 9. Feeling aggrieved by the order dated 12th October, 2000 made by the learned Metropolitan Magistrate below Application Exh. 7, the applicants have preferred the present Revision Application.

The opponent no. 2-Shri Harish A. Kapasi had booked a Flat No. E-15 in a block of flats named as Riddhi Siddhi Apartments being constructed by Rathi Construction and Finstock Private Limited. The complainant had also made payment to the tune of Rs. 1,63,000/= for the said flat. However, the builders i.e., Rathi Construction and Finstock Private Limited failed to complete the construction of the said flat no. E-15 and hand over possession of the same to the complainant. Feeling aggrieved, the complainant instituted Original Suit No. 407 of 1994 against the Rathi Construction and Finstock Private Limited for specific performance. Pending the said suit, it was learnt that the said builders had sold away the said Flat No. E-15 to the present petitioners. The petitioners, therefore, were impleaded as Defendants nos. 2 & 3 in the said suit. The said suit was partially decreed by the learned Civil Judge (SD), Ahmedabad [Rural] on 22nd December, 1999. The decree for specific performance was denied. The learned Judge held that, `defendants nos. 2 & 3 have made any collusion with defendant no. 1 and had paid illegally to them and had got illegal possession over the suit house is not at all proved before the Court.' The learned Judge was pleased to order defendant no. 1 to pay the sum of Rs. 1,80,000/= to the plaintiff-complainant with interest @ 24% p.a.. Pending the said suit, the complainant lodged the above Criminal case No. 2703 of 1994 in the Court of learned Metropolitan Magistrate, Ahmedabad against the Directors of the builders - Rathi Construction and Finstock Company Private Limited, the Chairman and the Secretary of Riddhi Siddhi Apartments and the present petitioners, the purchasers of the said flat No. E-15, for offence punishable under Secs. 406, 490, 420, 467, 468, 120-B and 114 IPC and Section 5 of the Gujarat Ownership Flats Act, 1973. Pending the said complaint, the accused nos. 1 & 5, Shri Dinesh Nemichand Jain, has passed away. The prosecution against him has thus abated. Names of the accused nos. 2 & 3, the remaining Directors of the Builders, have been dropped at the request of the complainant. The only accused that remain on fray are

the Chairman of the Riddhi Siddhi Apartments, the accused no. 4 and the present petitioners-the purchasers of the said Flat No. E-15. In view of the findings recorded by the Civil Court, the petitioners made Application Exh.7 for discharge under Sec. 245 CrPC before the learned Magistrate. The said application has been rejected by the learned Magistrate on 12th October, 2000. Feeling aggrieved, the petitioners-accused nos. 6 & 7 have preferred the present revision.

The learned Magistrate was of the view that the Application Exh. 7 was premature and could not be decided unless some evidence were led. I am afraid, I cannot agree with the reasoning adopted by the learned Magistrate. On perusal of the complaint, it is evident that the complaint was necessarily made against the accused nos.1 to 3, the Directors of the builders-Rathi Construction and Finstock Company Private Limited. No accusation has been made against the accused nos. 6 & 7 with respect to any of the offences for which the said accused have been arraigned. There is no allegation against either of the petitioners [accused nos. 6 & 7] with respect to the alleged collusion with the accused nos. 1 to 3 or accused nos. 4 & 5. Besides, the Civil Court has given a categorical finding against any such collusion which is binding to the criminal court. Any accusation of collusion shall fall on abatement of the prosecution against the accused nos. 1 and 5 and the dropping of the accused nos. 2 and 3 from the prosecution. Hence, in my view, nothing survives in the complaint lodged by the opponent no. 2 for which the petitioners [accused nos. 6 & 7] can be tried. Besides, the petitioners not being promoters, they cannot be arraigned for the offence punishable under Sec. 5 of the Gujarat Ownership Flats Act, 1973 either. The only accusation made against the petitioners is that of abetment commission of offence by the accused nos. 1 to 5. With the abatement of prosecution against the accused nos. 1 and 5 and dropping of the accused nos. 2 & 3 from the prosecution, the allegation of abatement of offence shall also fall.

In above view of the matter, the petitioners accused nos. 6 & 7 deserve to be discharged under Sec. 245 CrPC. The Revision Application is accordingly allowed. The Application Exh. 7 made by the petitioners accused nos. 6 & 7 in Criminal Case No. 2703 of 1994 stands allowed. The petitioners are ordered to be discharged. Rule is made absolute.

[Ms. R.M Doshit, J.]

Prakash*